

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SHERYL SMITH,

Plaintiff,

v.

FRESNO COMMUNITY HOSPITAL  
AND MEDICAL CENTER, et al.,

Defendants.

No. 1:20-cv-01616-DAD-BAM

**ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS**

(Doc. No. 10)

This matter is before the court on defendant Fresno Community Hospital and Medical Center (“FCHMC”) dba Clovis Community Medical Center’s (“CCMC”) motion to dismiss plaintiff Sheryl Smith’s complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. No. 10.) Pursuant to General Order No. 617 addressing the public health emergency posed by the COVID-19 pandemic, defendant’s motion was taken under submission on the papers. (Doc. No. 11.) For the reasons explained below, the court will grant defendant’s motion to dismiss with respect to plaintiff’s third cause of action and grant plaintiff leave to amend her complaint.

**BACKGROUND**

This action arises from the alleged wrongful death of Mr. Bryson Ferguson, caused by allegedly negligent medical treatment that failed to detect what proved to be a fatal underlying condition.

1 Plaintiff filed her complaint on November 13, 2020 as the successor in interest to the  
2 Estate of Bryson Ferguson. (Doc. No. 1 (“Compl.”).) Plaintiff was Mr. Ferguson’s mother, and  
3 is the legal representative of his estate. (*Id.* at ¶ 3.) The complaint asserts causes of action  
4 against five separate defendants: FCHMC dba CCMC, Dr. Scott Ford, Chiropractic Health  
5 Center/Accident Recovery Center, Reza Shakeri, and John Ferguson. (*Id.* at ¶¶ 4–8.) Plaintiff’s  
6 complaint alleges the following. Defendant FCHMC owns CCMC. (*Id.* at ¶ 4.) On October 26,  
7 2019, decedent Bryson Ferguson (“Mr. Ferguson” or “decedent”) was in a car accident which  
8 resulted in injuries to his left shoulder, arm, side, ankle, and the right side of his head. (*Id.* at ¶  
9 11.) He lost consciousness after the collision for some time and was in an altered mental state  
10 when he regained consciousness. (*Id.* at ¶ 11.) An ambulance transported Mr. Ferguson to  
11 CCMC, where medical providers were informed that he had lost consciousness at the scene of the  
12 accident. (*Id.* at ¶¶ 12–13.) CCMC had knowledge of Mr. Ferguson’s medical history of epilepsy  
13 and seizures. (*Id.*) Mr. Ferguson complained to the nurses and doctors of a headache and pain on  
14 the right side of his face. (*Id.* at ¶ 13.)

15 Defendant Dr. Ford treated Mr. Ferguson while at CCMC but failed to take proper  
16 precautions to evaluate Mr. Ferguson’s neurological condition. (*Id.* at ¶ 16.) Medical research  
17 and literature, which Dr. Ford should have been aware of, documents the heightened risks that  
18 epileptics are prone to suffer following a head injury, yet no special attention was given to Mr.  
19 Ferguson’s complaints. (*Id.* at ¶ 16.) Mr. Ferguson was discharged from the hospital later that  
20 day on October 26, 2019 when Dr. Ford considered him to be stable and instructed him to consult  
21 a doctor if any symptoms developed following his discharge from the hospital. (*Id.* at ¶ 17.) Mr.  
22 Ferguson followed up twice with a medical provider after the accident. (*Id.* at ¶ 18.) On  
23 November 17, 2019, it was discovered that Mr. Ferguson had died two days earlier due to a  
24 breakthrough seizure. (*Id.* at ¶ 20.) Mr. Ferguson received inappropriate medical emergency  
25 screening compared to what similarly situated patients in his position have received. (*Id.* at ¶ 22.)  
26 If he had received the medically appropriate screening, Mr. Ferguson’s life would not have ended  
27 when it did. (*Id.* at ¶ 22.)

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1 Plaintiff asserts claims for medical negligence and wrongful death. (*Id.* at ¶¶ 25–33.)  
2 Plaintiff also brings claims for violations of the Emergency Medical Treatment and Active Labor  
3 Act (“EMTALA”) and California Health and Safety Code § 1317. (*Id.* at ¶¶ 34–46.)

4 On December 7, 2020, FCHMC filed a motion to dismiss plaintiff’s EMTALA claim  
5 pursuant to Rule 12(b)(6) and argued that in the absence of that claim this court should decline to  
6 exercise supplemental jurisdiction over plaintiff’s state law claims brought against FCHMC.  
7 (Doc. No. 10 at 1.) On January 5, 2021, plaintiff filed her opposition to defendant’s motion to  
8 dismiss. (Doc. No. 12.) On January 12, 2021, defendant filed its reply thereto. (Doc. No. 15.)

9 **LEGAL STANDARD**

10 The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal  
11 sufficiency of the complaint. *N. Star Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir.  
12 1983). “Dismissal can be based on the lack of a cognizable legal theory or the absence of  
13 sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901  
14 F.2d 696, 699 (9th Cir. 1990). A claim for relief must contain “a short and plain statement of the  
15 claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Though Rule 8(a)  
16 does not require detailed factual allegations, a plaintiff is required to allege “enough facts to state  
17 a claim for relief that is plausible on its face.” *Bell Alt. Corp. v. Twombly*, 550 U.S. 544, 570  
18 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). “A claim has facial plausibility when the  
19 plaintiff pleads factual content that allows the court to draw the reasonable inference that the  
20 defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678.

21 In determining whether a complaint states a claim on which relief may be granted, the  
22 court accepts as true the allegations in the complaint and construes the allegations in the light  
23 most favorable to the plaintiff. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Love v.*  
24 *United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). It is inappropriate to assume that the plaintiff  
25 “can prove facts which it has not alleged or that the defendants have violated the . . . laws in ways  
26 that have not been alleged.” *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of*  
27 *Carpenters*, 459 U.S. 519, 526 (1983).

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## DISCUSSION

Defendant FCHMC filed this motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Defendant argues that plaintiff offers only a conclusory pleading that is lacking factual allegations in support of her EMTALA claim. (Doc. No. 10-1 at 4.) Below, the court will address whether plaintiff has stated a cognizable claim under the EMTALA.

### A. Whether Plaintiff States an EMTALA Claim Against Defendant

Plaintiff brings her third claim for relief solely against FCHMC pursuant to the EMTALA, 42 U.S.C. § 1395dd et seq. (*Id.* at ¶ 35.) The EMTALA requires hospitals to provide an “appropriate medical screening examination within the capability of the hospital’s emergency department.” *Jackson v. East Bay Hosp.*, 246 F.3d 1248, 1254 (9th Cir. 2001); *see also* 42 U.S.C. § 1395dd(a) (1986). The screening is meant to determine “whether or not an emergency medical condition . . . exists.” *Id.* An emergency medical condition within the meaning of the statute is defined as:

a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in – (i) placing the health of the individual . . . in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part . . . .

42 U.S.C. § 1395dd(e)(1)(A).

Plaintiff alleges that FCHMC did not provide the decedent with screening as required by the EMTALA for two reasons. (*Id.* at ¶ 36.) First, plaintiff alleges that the screening examination the decedent received was not sufficient compared to that received by other patients in his position. Second, plaintiff alleges that the screening examination in this case was cursory, and therefore did not appropriately identify Mr. Ferguson’s emergency condition based on his symptoms and relevant medical history of epilepsy. (*Id.*) With regard to this second allegation, plaintiff contends that Mr. Ferguson had an emergency medical condition as defined by the EMTALA because of his symptoms, which suggested a life-threatening neurological condition. (*Id.* at ¶ 38.) Plaintiff further asserts that Mr. Ferguson was improperly discharged from the

1 hospital in an unstable condition after receiving a deficient screening examination. (*Id.*) For  
2 these reasons, plaintiff claims that FCHMC violated the EMTALA's screening requirement,  
3 resulting in Mr. Ferguson's death. (*Id.* at ¶ 39.)

4 "As the text of [the EMTALA] clearly states, the hospital's duty to stabilize the patient  
5 does not arise until the hospital first detects an emergency medical condition." *Jackson*, 246 F.3d  
6 at 1254–55 (quoting *Eberhardt v. City of Los Angeles*, 62 F.3d 1253, 1259 (9th Cir. 1995)). In  
7 *Jackson*, the court considered whether a hospital violated the EMTALA's screening requirements  
8 by providing what plaintiff asserted to be insufficient medical screening. *Jackson*, 246 F.3d at  
9 1255. That insufficient screening allegedly led the hospital to fail to order the correct diagnostic  
10 testing which, if administered, would have led to an appropriate diagnosis and prevented the  
11 patient's death. *Id.* The Ninth Circuit in *Jackson* recognized that the EMTALA does not require  
12 a hospital to ensure medically adequate examinations and that, instead, the act's purpose was to  
13 limit hospitals from refusing to treat patients who were not covered by insurance or who could  
14 not otherwise pay for medical services. *Id.* at 1256; *see also Lopez v. Contra Costa Regional*  
15 *Medical Center*, 903 F. Supp. 2d 835, 838 (N.D. Cal. 2012) ("Congress passed EMTALA, also  
16 known as the 'Patient Anti Dumping Act,' to prohibit hospital emergency rooms from refusing to  
17 treat indigent and uninsured patients or transferring patients to other hospitals without first  
18 stabilizing their condition.") Interpreting the statute, the Ninth Circuit adopted the comparative  
19 test previously adopted by several other circuits under which "a hospital satisfies EMTALA's  
20 'appropriate medical screening' requirement if it provides a patient with an examination  
21 comparable to the one offered to other patients presenting similar symptoms, unless the  
22 examination is so cursory that it is not 'designed to identify acute and severe symptoms that alert  
23 the physician of the need for immediate medical attention to prevent serious bodily injury.'"  
24 *Jackson*, 246 F.3d at 1256 (quoting *Eberhardt*, 62 F.3d at 1257). The Ninth Circuit in *Jackson*  
25 also recognized that a hospital's duty to stabilize a patient does not arise until an emergency  
26 medical condition is detected and that if no such condition is recognized, the hospital does not  
27 violate the EMTALA. *Jackson*, 246 F.3d at 1257 (quoting *Eberhardt*, 62 F.3d at 1259).

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1       In *Jackson*, the court concluded that despite the patient's death, the hospital had not  
2 violated the EMTALA because it had complied with the screening requirements of the statute.  
3 *Jackson*, 246 F.3d at 1256. The court observed that the plaintiffs had failed to present evidence  
4 that the decedent had been treated differently than other similarly situated patients and that  
5 because it had not actually detected the underlying condition upon which the plaintiff's claim was  
6 based, the hospital had not violated the Act. *Id.* at 1257. Under the "actual detection" rule  
7 adopted by the Ninth Circuit, unless actual knowledge of the emergency medical condition by the  
8 hospital is shown, the EMTALA is not violated and a mere failure to diagnose the actual cause of  
9 a patient's symptoms cannot serve as the basis for a violation of EMTALA's stabilization  
10 requirements. *Id.*

11       Below, the court will analyze the allegations of plaintiff's complaint in support of the two  
12 prongs upon which a violation of the EMTALA can be found: (1) failure to stabilize a patient's  
13 known emergent condition; and (2) providing disparate screening to a patient.

14       1.     Whether Plaintiff Alleges a Claim for Failure to Stabilize an Emergent Condition

15       A hospital's duty to stabilize a patient pursuant to EMTALA arises only once the hospital  
16 detects an emergency medical condition. *Jackson*, 246 F.3d at 1254–55 (quoting *Eberhardt*, 62  
17 F.3d at 1259). A hospital or a doctor's failure to diagnose the true cause of a patient's symptoms  
18 cannot serve as the basis for a violation of EMTALA's stabilization requirements. *Id.* at 1257. If  
19 a doctor does not detect a medical emergency, the hospital has no duty under the EMTALA to  
20 stabilize the patient before discharge. *Baker v. Adventist Health, Inc.*, 260 F.3d 987, 994 (9th Cir.  
21 2001). To state a valid EMTALA claim, a plaintiff must allege that the decedent had an  
22 emergency condition which the hospital detected, yet failed to stabilize.

23       In her complaint, plaintiff alleges that FCHMC failed to provide the decedent with  
24 appropriate emergency screening because the screening provided was so cursory that it could not  
25 identify the decedent's emergency condition. (Compl. at ¶ 36.) Plaintiff alleges that when Mr.  
26 Ferguson entered the hospital on October 25, 2019, he was clearly presenting an emergent  
27 condition under the EMTALA. (*Id.* at ¶ 37.) Plaintiff argues that, when he was discharged from  
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1 FCHMC, Mr. Ferguson was in an unstable condition and unscreened by the emergency  
2 department. (*Id.*)

3 Defendant argues that the hospital's failure to conduct additional diagnostic testing on  
4 decedent despite his medical history does not constitute a violation of the EMTALA, although  
5 defendant concedes that its failure to do so may constitute medical malpractice. (Doc. No. 15 at  
6 3); *see Hoffman v. Tonnemacher*, 425 F. Supp. 2d 1120, 1135 (E.D. Cal. 2006). Defendant  
7 further contends that plaintiff has not alleged what the symptoms of decedent's emergency  
8 condition were nor why she believes Mr. Ferguson was unstable when he was discharged from  
9 the hospital, considering he lived for 25 days after his discharge. (*Id.* at 4–5.)

10 In her opposition, plaintiff cites to a handful of cases that she asserts show her allegations  
11 are sufficient to support both her EMTALA claim and her medical malpractice claims against  
12 defendant. (Doc. No. 12 at 7–8.) Plaintiff first cites *Gatewood v. Washington Healthcare*  
13 *Corporation*, 933 F.2d 1037, 1041 (9th Cir. 1991) in support of her assertion that “inappropriate  
14 medical care of an emergency patient may constitute both medical malpractice and an EMTALA  
15 claim.” (*Id.* at 7.) However, the Ninth Circuit in *Gatewood* concluded that the plaintiff’s claim in  
16 that case was properly dismissed for failing to state a cause of action under EMTALA because  
17 “[the court] cannot agree that [EMTALA] creates a sweeping federal cause of action with respect  
18 to what are traditional state-based claims of negligence or malpractice.” *Gatewood*, 933 F.2d at  
19 1041. Plaintiff also cites *Power v. Arlington Hospital Association*, 42 F.3d 851, 859 (4th Cir.  
20 1994), arguing that the decision in that case shows how medical malpractice claims may overlap  
21 with the EMTALA. (Doc. No. 12 at 7.) However, the court’s decision in *Power* in fact  
22 recognized that both a medical malpractice claim and a claim of disparate treatment under the  
23 EMTALA would be established *only* if the hospital failed to perform all of or part of the standard  
24 battery of tests required under the appropriate medical protocol. *Power*, 42 F.3d at 859. In  
25 contrast to plaintiff’s framing of that decision, the court in *Power* held that if the hospital  
26 performs standard required tests but in “evaluating the results [from those tests] draws an  
27 incorrect conclusion, a violation of EMTALA may not be established, but medical negligence  
28 may be.” *Id.* In this vein, “the plain language of EMTALA informs [the court] that a medical

1 screening examination is ‘appropriate’ if it is designed to identify *acute and severe* symptoms that  
2 alert the physician of the need for *immediate* medical attention to prevent serious bodily injury.”  
3 *Eberhardt*, 62 F.3d at 1257. In other words, a hospital that performs all standard required tests,  
4 tests which identify acute and severe symptoms, cannot be found liable under EMTALA for a  
5 misreading of the test results or a misdiagnosis stemming therefrom.

6         Similar to the plaintiffs in *Jackson*, plaintiff here has not alleged sufficient facts which, if  
7 proven, would show the defendant hospital failed to stabilize an emergency condition presented  
8 by the decedent. Plaintiff acknowledges that defendant screened Mr. Ferguson and released him  
9 once FCHMC believed he was stable. (Compl. at ¶ 17.) However, plaintiff alleges that defendant  
10 did not give Mr. Ferguson “a screening examination that addressed his probable post-collision  
11 neurological symptoms as compared to pertinent emergency policies and protocols in effect at the  
12 time.” (Compl. at ¶ 36.) Plaintiff alleges the screening examination of Mr. Ferguson was cursory  
13 and not in line with pertinent emergency policies, but provides no factual allegations explaining  
14 why or how that was the case. (*Id.*) “The EMTALA does not require physicians to detect  
15 medical conditions that are not manifested by acute and severe symptoms, nor those that do not  
16 require immediate medical attention to prevent serious bodily injury.” *Eberhardt*, 62 F.3d at  
17 1257.

18         Here, plaintiff has failed to adequately allege that Mr. Ferguson’s neurological condition  
19 was manifested by any “acute” or “severe” symptoms, that the condition required urgent medical  
20 attention (as would appear belied by decedent having lived another 25 days following his hospital  
21 discharge), or that the standard tests performed by defendant would likely fail to detect such acute  
22 and severe symptoms. (*See* Doc. No. 15 at 4–5.) Defendant’s duty under EMTALA is to screen  
23 the patient and stabilize whatever emergency condition is detected at the time. *See Baker*, 260  
24 F.3d at 994. Even if defendant failed to properly diagnose Mr. Ferguson, it would not alone  
25 provide grounds for finding a violation of the EMTALA. The court concludes that although  
26 plaintiff has alleged that defendant failed to detect the correct underlying medical condition, her  
27 allegations even if proven to be true fail to establish that defendant violated the EMTALA in  
28 screening Mr. Ferguson and releasing him when defendant believed he had been stabilized.

**2. Whether Plaintiff Alleges a Claim for Disparate Treatment**

To properly state a claim that defendant screened Mr. Ferguson in a disparate manner compared with other patients in similar situations, plaintiff must allege facts “sufficient to support a finding that [he] received a materially different screening than that provided to others in [his] condition. It is not enough to proffer expert testimony as to what treatment should have been provided to a patient in the plaintiff’s position.” *Romar ex rel. Romar v. Fresno Cnty. Hosp. and Med. Ctr.*, 583 F. Supp. 2d 1179, 1185 (E.D. Cal. 2008) (quoting *Reynolds v. Maine Gen. Health*, 218 F.3d 78, 84 (1st Cir. 2000)). Moreover, the EMTALA does not require hospitals to provide identical screening to patients presenting different symptoms, nor does it require hospitals to perform screenings beyond their capabilities. *Baker*, 260 F.3d at 994. However, “evidence that a hospital did not follow its own screening procedures can support a finding of EMTALA liability for disparate treatment.” *Id.* at 995 (quoting *Battle v. Mem. Hosp.*, 228 F.3d 544, 558 (5th Cir. 2000)); *see also Power*, 42 F.3d at 859 (where a hospital denies that it has any standard emergency room protocols or procedures “an EMTALA claim may be established through proof of a failure to meet the standard of care to which the Hospital adheres” even if “allowance of such proof potentially blurs the line somewhat between a malpractice claim and an EMTALA claim[.]”) (quotation omitted). Thus, for plaintiff here to sufficiently allege that Mr. Ferguson received disparate treatment, she must allege that he was treated differently from other patients, or that the hospital violated its own screening procedures.

In her complaint, plaintiff alleges that FCHMC failed to provide Mr. Ferguson with appropriate emergency screening because the screening he received was not comparable to what other patients in his situation, with his symptoms would have received. (Compl. at ¶ 36.) Plaintiff alleges that Mr. Ferguson “did not receive a screening examination that addressed his probable post-collision neurological symptoms as compared to pertinent emergency policies and protocols in effect at the time.” (*Id.*) In opposing defendant’s motion to dismiss, plaintiff contends that “[a]n emergency medical screening examination is inappropriate if it is not designed to identify acute and severe symptoms indicating the need for immediate medical

1 attention to prevent death or serious bodily injury.” (Doc. No. 12 at 7) (quoting *Eberhardt*, 62  
 2 F.3d at 1257.)

3 As defendant points out, the allegations of plaintiff’s complaint are conclusory and do not  
 4 provide any facts supporting or explaining in what way Mr. Ferguson received different treatment  
 5 from other similarly situated patients. (Doc. Nos. 15 at 4; 12 at 8.) In this regard, plaintiff alleges  
 6 that the hospital “should have consulted a neurology specialist regarding Mr. Ferguson’s  
 7 symptoms, and that they also should have ordered and had performed imaging studies that would  
 8 have enabled them to ascertain the post-traumatic condition of his brain.” (Compl. at ¶ 16.)  
 9 While these allegations theoretically may support a basis for a medical malpractice claim, they do  
 10 not support a claim for a violation of adequate screening under EMTALA. *See Jackson*, 246 F.3d  
 11 at 1255 (quoting *Marshall v. E. Carroll Parish Hosp. Serv.*, 134 F.3d 319, 323–24 (5th  
 12 Cir.1998) (“[A] treating physician’s failure to appreciate the extent of the patient’s injury or illness  
 13 . . . may constitute negligence or malpractice, but cannot support an EMTALA claim for  
 14 inappropriate screening . . . . It is the plaintiff’s burden to show that the Hospital treated her  
 15 differently from other patients”)). Here, plaintiff has simply alleged no facts which if proven  
 16 would demonstrate that another patient in the decedent’s situation or presenting his symptoms  
 17 would have received different treatment or that the hospital violated its own screening procedures  
 18 in connection with his treatment.

19 Accordingly, plaintiff has not sufficiently alleged that defendant violated the EMTALA  
 20 under either prong of that provision.

21 **B. Leave to Amend**

22 Generally, “[c]ourts are free to grant a party leave to amend whenever ‘justice so  
 23 requires,’ and requests for leave should be granted with ‘extreme liberality.’” *Moss v. U.S. Secret*  
 24 *Serv.*, 572 F.3d 962, 972 (9th Cir. 2009). There are several factors a district court considers in  
 25 whether to grant leave to amend, including undue delay, the movant’s bad faith or dilatory  
 26 motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice  
 27 to the opposing party, and futility. *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 574 (9th  
 28 Cir. 2020) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Of the factors from *Foman*, the

1 court should particularly consider prejudice to the opposing party. *Id.*; *Eminence Cap., LLC v.*  
2 *Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

3 Here, there is no indication that allowing amendment to provide plaintiff an opportunity to  
4 cure the noted deficiencies in the allegations of the complaint would be prejudicial to defendant,  
5 and defendant does not so claim. There is also no indication that plaintiff has acted in bad faith,  
6 and there have been no other attempts to cure deficiencies by previously allowed amendments.  
7 Plaintiff will therefore be granted leave to amend.<sup>1</sup>

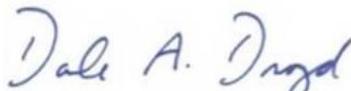
8 **CONCLUSION**

9 Accordingly,

- 10 1. The motion to dismiss (Doc. No. 10) brought on behalf of defendant Fresno  
11 Community Hospital and Medical Center is granted;  
12 2. Plaintiff's third cause of action for alleged violation of the EMTALA is dismissed  
13 without prejudice; and  
14 3. Within thirty (30) days of service of this order plaintiff shall file any amended  
15 complaint or notify the court of her intention to not proceed with this action.

16 IT IS SO ORDERED.

17 Dated: July 20, 2021

  
18 UNITED STATES DISTRICT JUDGE

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25 <sup>1</sup> Defendant also requests that the court dismiss plaintiff's complaint in its entirety for lack of  
26 supplemental jurisdiction pursuant to 28 U.S.C. § 1337(c). (Doc. No. 10 at 2.) In the event no  
27 amended complaint is filed or the noted deficiencies are not cured by an amended complaint,  
28 absent additional argument on the issues addressed by this order, the court would intend to  
decline to exercise supplemental jurisdiction and would dismiss the complaint without prejudice  
to the filing of an action in state court.